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No. 599

IN THE

Supreme Court of the United States

October Term, 1962

ALBERT FREED,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

RESPONSE OF PEOPLE OF THE STATE OF NEW YORK IN OPPOSITION TO PETITIONER'S APPLICATION FOR A WRIT OF CERTIORARI

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Statement

Petitioner seeks review by a writ of certiorari of a judgment of the Court of Special Sessions of the City of New York, Appellate Part, Second Judicial Department, made and entered on March 7, 1962 which affirmed a judgment of conviction of the Magistrates' Court of the City of New York rendered on April 19, 1961, convicting petitioner, after trial, of the crime of bookmaking (New York Penal Law, §§986 and 986-b).

Reargument of the appeal was denied by order made on July 26, 1962.

Leave to appeal to the Court of Appeals of the State of New York from the judgment of affirmance of the Court of

Special Sessions of the City of New York, as required by section 528 of the New York Code of Criminal Procedure, was denied by Hon. Stanley H. Fuld, Associate Judge of the said Court of Appeals, on September 20, 1962.

Record Facts Material to the Question Presented

Trial of the defendant was had on March 30, 1961.

Detective Michael Casale testified for the prosecution that on December 23, 1960, at about 1:40 p.m., he had defendant under observation for about ten minutes in front of a building containing a store on the street floor and two families above; that during that period three men, at separate intervals, approached petitioner and conversed with him; that after a short conversation with the second man, the petitioner and that man entered the hallway of the building in front of which they were standing and emerged a short time later; that this performance was repeated with the third man who approached petitioner, at which point he (Casale) entered the hallway and saw the unknown man hand a slip of paper to petitioner; and that he (Casale) thereupon identified himself as a police officer, placed petitioner under arrest and took from petitioner's hand the slip of paper which the unknown man had given to petitioner, as well as two other slips of paper from the waistband of petitioner's trousers. These slips, Casale testified, contained wagers on horse races.

When the slip of paper which Casale saw the unknown man hand to petitioner and which Casale took from petitioner's hand was offered in evidence, petitioner's counsel (who is also his counsel upon this petition for certiorari)

stated, "I have no objections." * Again, when the slips taken from the waistband of petitioner's trousers were offered in evidence, the same counsel also stated, "I have no objection." *

ARGUMENT

POINT ONE

Since the determination of the Court of Special Sessions might have rested on an adequate non-federal ground, certiorari by this court should not be granted.

In affirming the judgment of conviction the Court of Special Sessions rendered no opinion. It therefore does not appear from the record whether such affirmance was on the basis that the failure to object to the admission into evidence of the slips of paper now claimed to have been illegally seized constituted a waiver of such claim. However, in the petition for certiorari it is assumed that under New York law the failure to object to the admission of evidence upon the ground that it was obtained in violation of the Fourth Amendment of the United States Constitution constitutes a waiver of such claim, that such failure to object is fatal to such claim upon appeal, and that the affirmance by the Court of Special Sessions was upon that ground. And as authority for this, cases of the New York State Court of

* In the statement of facts describing what occurred at the trial, at the bottom of page 5, it is stated that "The defendant took the position that the admission by the court into evidence of any of the People's Exhibits, they being the fruits of an unreasonable search and seizure, without probable cause or other warrant, was error and violated the appellant's constitutional rights * * *." In view of the express waiver of objection in the record of this evidence, this obviously is not a correct statement.

Appeals holding that failure "to object to unconstitutional search and seizure, constitutes a waiver of constitutional right * * *" are cited (pet., p. 3).

In this, petitioner is incorrect. Though an objection is required to give the New York State Court of Appeals' jurisdiction to review an affirmance by a lower appellate court of a conviction (New York State Constitution, art. 6, §7), this was not true (at the time of this appeal) as to the Court of Special Sessions, to which court petitioner seeks the issuance of a writ of certiorari. For section 50 of the New York City Criminal Courts Act provided, so far as pertinent here, as follows:

> "After hearing the appeal the court must give judgment without regard to technical errors or defects or to exceptions which do not affect the substantial rights of the defendants, and may render the judgment which the court below should have rendered, or may, according to the justice of the case, affirm or reverse the judgment, in whole or in part, as to all or any of the defendants, if there be more than one, or may order a new trial, or may modify the sentence. * * *."

In any event, so far as appears from the record, the judgment of the Court of Special Sessions might have rested on an adequate non-federal ground. In that case, this court lacks jurisdiction to review by a writ of certiorari. *Murdock* v. *City of Memphis* (1874) 87 U. S. [20 Wall] 590, 636; *Stembridge* v. *Georgia* (1951) 343 U. S. 541, 547; *Durley* v. *Mayo* (1955) 351 U. S. 277, 284-285. In fact, this court has dismissed a writ of certiorari where it was "unable to say that the judgment denying habeas corpus may not rest on an adequate non-federal ground * * *." *Phyle* v. *Duffy* (1947) 334 U. S. 431, 441, rehearing den. 334 U. S. 862.

Moreover, the question always is whether decision of a claim under the Fourteenth Amendment is necessary to the judgment rendered. *Loftus* v. *Illinois* (1947) 334 U. S. 804, 806; also see *Edelman* v. *California* (1952) 344 U. S. 357, 358-9. But it does not appear from the record that this obtains here. Therefore, jurisdiction in the matter is also lacking for this reason.

POINT TWO

The constitutional right to be secure against unreasonable searches and seizures may be waived by failure to assert it.

The predicate of petitioner's claim in this proceeding is that holding a defendant to the failure to raise a claim of illegal search and seizure in a state which prior to *Mapp* v. Ohio (1961) 367 U. S. 643 held such evidence nevertheless admissible violates due process under the Fourteenth Amendment.

It has been settled under federal law for many years that a claim that evidence is inadmissible because it was obtained by unlawful search and seizure cannot be raised on appeal in the absence of objection at the trial or the failure to move to suppress. *Zachary* v. *United States*, (1960) 275 F. 2d 793, 795-796; *United States* v. *Sheba Bracelets*, (1957) 248 F. 2d 134, 142-144; *United States* v. *Romero*, (1957) 249 F. 2d 371, 374; *United States* v. *Sferas*, (1954) 210 F. 2d 69, 73-74; *United States* v. *Hershkowitz*, (1953) 209 F. 2d 881, 886; also see *Agnello* v. *United States*, (1925) 269 U. S. 20, 34-35; *Segurola* v. *United States*, (1927) 275 U. S. 106, 111-112; *Jordan* v. *United States* (1958) 254 F. 2d 710,

712. That the same constitutional standard is applicable to the states requires no argument. And the fact that before *Mapp* a state may have held illegally seized evidence nevertheless admissible under the doctrine of *Wolf* v. *Colorado* (1949) 338 U. S. 25 does not alter this standard so that in such case the failure to object to such evidence would not constitute a waiver.

The contention made by petitioner that the refusal of the New York Court of Appeals to consider a claim of unlawful search and seizure in the absence of an objection in a pre-*Mapp* case "places a premium upon the stupid lawyer" and the "well informed lawyer and his client are * * * deprived of federally created constitutional rights" not only is unpersuasive to establish a deprivation of due process but is ill-advised. To begin with, the constitutional objection was made in the *Mapp* trial at a time when Ohio did not have the exclusionary rule. Even in New York objections were made to the admission of illegally seized evidence prior to *Mapp*, when *People* v. *Defore* (1926) 242 N.Y. 13, cert. den. 270 U. S. 585, was the controlling law. See *People* v. *Loria*, (1961) 10 N Y 2d 368; *People* v. *O'Neill*, (1962) 11 N Y 2d 148; *People* v. *Yarmosh*, (1962) 11 N Y 2d 397; *People* v. *Coffey* (1962) 11 N Y 2d 142. Moreover, this petitioner's counsel, in the case of *People* v. *Amendolare* (which was argued in the New York Court of Appeals on December 6, 1962 and in which respondent confessed error and consented to a reversal of the conviction) raised the question of the legality of the seized evidence by cross-examining a police officer as to whether he had a search warrant to make a search. Cf. *People* v. *O'Neill*, *supra*. The fatal rationale against petitioner's postulate that the absence of an objec-

tion to illegally seized evidence in New York prior to *Mapp* was forcefully and cogently set forth in the concurring opinion of Judge VanVoorhis in *People* v. *Friola*, 11 N Y 2d 157, at pp. 160-161:

> "It was well known before *Mapp* v. *Ohio* (367 U. S. 643) was decided that *Wolf* v. *Colorado* (338 U. S. 25) and *People* v. *Defore* (242 N.Y. 13) had been widely criticized, and Bench and Bar expected that their doctrines would be reviewed and possibly overruled. That is the reason on account of which the issue was presented to the Supreme Court in *Mapp* v. *Ohio* after adequate objection had been made at the trial of that case. Courts are continually reconsidering old precedents and, if no objection or equivalent was required here, objection would never be necessary to raise a question of law where it is urged that some former decisional law be changed. That would not accord with the purposes of the rule requiring an objection, which is to apprise the court and the adversary of the position being taken when the ruling is made. It is important to know at the time that rulings are being challenged so that additional evidence or argument may be presented and the point considered by the trial court with knowledge that the rule is being contested."

CONCLUSION

The petition for certiorari should be denied in all respects.

Respectfully submitted,

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December, 1962.